1986 CanLII 7388 (TCC)

Eleanor B. Kushnir, Audrey N. MacLean, Peter L. Hartman, Ben Bauer, Appellants,

and

Minister of National Revenue, Respondent.

Tax Court of Canada (Christie, A.C.J.T.C.), April 24, 1986.

1986 CanLII 7388 (TCC)

T. H. Leigh-Bell for the appellants.
M. Templeton for the respondent.

Christie, A.C.J.T.C.:—These appeals were heard on common evidence. The issue in each case is whether, in computing his or her taxable income for the year or years under review, the appellant is entitled to deduct amounts expended for the care and training at a school of a dependent child. The taxation year or years and the amounts involved in respect of each appellant are: Kushnir 1980 — $6,175*; MacLean 1980 — $6,175, 1981 — $7,700; Hartman 1981 — $6,250 and Bauer 1979 — $5,800, 1980 — $6,325. The date of mailing the notices of reassessment to the appellants is: Kushnir — November 8, 1982, MacLean — August 25, 1983 (both years), Hartman — August 11, 1983 and Bauer — August 25, 1983 (both years).

The legislation of primary relevance to these appeals is subparagraph 110(1)(c)(vi) of the *Income Tax Act* ("the Act"). It provides:

> 110(1) For the purpose of computing the taxable income of a taxpayer for a taxation year, there may be deducted from his income for the year such of the following amounts as are applicable:
>
> . . .
>
> (c) an amount equal to that portion of medical expenses in excess of 3% of the taxpayer's income for the year paid either by the taxpayer or his legal representatives
>
> if . . . payment was made
>
> . . .
>
> (vi) for the care, or the care and training, at a school, institution or other place of the taxpayer, his spouse or any such dependant, who has been certified by an appropriately qualified person to be an individual who, by reason of a physical or mental handicap, requires the equipment, facilities

*Kushnir also intended to appeal her 1981 taxation year in respect of the same issue, but at the outset of the hearing application was made on behalf of the respondent to quash this purported appeal. She instituted the appeal after 90 days from the day notice was mailed to her that the Minister had confirmed the reassessment in that regard thereby falling to comply with section 169 of the Act. It was conceded that it was too late to grant an extension of time under section 167 because over one year had elapsed after the expiration of the 90 days with the consequence that the Court was without jurisdiction to hear the appeal.

> or personnel specially provided by that school, institution or other place for the care, or the care and training, of individuals suffering from the handicap suffered by that individual.

It is undisputed that the amounts sought to be deducted were paid in respect of children who were dependent on the appellants. There is however a serious question regarding whether the amounts sought to be deducted were paid in respect of persons who were certified as required under subparagraph 110(1)(c)(vi) of the Act.

The school involved in these appeals is Robert Land Academy. It is located near the Village of Wellandport on the Niagara Peninsula, Ontario. One of its founders and headmaster since its creation is Major Scott Bowman. The background to the establishment of the school is that by Letters Patent dated February 23, 1973, a charter was issued under the *Business Corporations Act* of Ontario to Bowman and others constituting them as a non-profit corporation without share capital under the name of *THE CREATIVE CENTRE FOR LEARNING DISABILTIES* ("the Corporation") for these objects:

> a) to implement specialized programmes to assist young people with learning handicaps and their families;
>
> b) to help individuals and families make socially-satisfying and constructive adjustments within the community setting which will help them work through their problems, whether material, psychological or spiritual;
>
> c) to stimulate, to help promote and to participate in desirable and constructive community programmes which have as an objective the welfare of the individual and the family;
>
> d) to encourage and promote education and training in these fields and to develop opportunities for service by volunteers; and
>
> e) subject to the *Mortmain and Charitable Uses Act* and the *Charitable Gifts Act*, to receive, acquire and hold gifts, donations, legacies and devises.

Initially the Corporation founded a summer camp, Camp Keywaatan, which the Major said "had a very strong remedial educational component, as well as a behaviour modification component." Youths were referred to the camp from such sources as psychiatrists, psychologists and school boards. Soon after, a children's mental health centre called Horizon's was established as a division of the Corporation. It was described as "a residential therapeutic mental health centre licensed under the Ministry of Health at that time as a children's mental health centre and later under the Ministry of Community and Social Services as a very highly specialized therapeutic residence for boys only, who had encountered tremendous difficulties, not only in the schools, but also in the community." The foundation of Robert Land Academy followed in 1977 as a further division of the Corporation. The land on which it is located was sold to the Corporation by another corporation, the shareholders of which included Bowman. It is based on "a military theme." The campus is modelled on a British fort of the early 19th century. A parade square is the centrepiece of the campus. Military terminology and trappings abound. The dining hall is the mess. There are 7 a.m. inspections of the cadets by the sergeant-major. Civilian clothing is dispensed with and uniforms designed along Canadian military lines are worn. Military ranks are assigned. There is a precision drill team. People stand at attention and salute, etc. All of the teaching staff are graduates

1986 CanLII 7388 (TCC)

from Canadian universities with Bachelor or Masters degrees. They are chosen for what is regarded as their adaptability to the environment of the academy.

The students are all in residence. All are male and range in age from 10 to 19 years. Bowman said that the student body is composed of persons "who have had a history of specific learning and/or behavioural and/or sensorial or neurological problems." He added later that it is the policy of the school to restrict admission to boys afflicted by learning, behavioural or neurological problems. A brochure prepared under the direction of the Corporation's management and distributed by it was entered in evidence. *Inter alia*, it conveys these messages:

> Robert Land Academy is part of a registered, non-profit organization authorized to issue tax deductible receipts. Further tax deductible benefits can be obtained because of the developmental learning program provided by the Academy. The annual fee comprises a tuition and room and board expense.

The next witness to testify on behalf of the appellants was Dr. Murray McGovern. In 1957 he became a Fellow of the Royal College of Physicians (Canada) specializing in pediatrics. In 1971 he became a Fellow of the same institution specializing in psychiatry. The answer to the preliminary question of whether he qualified as an expert witness was yes. He played a role in founding the Academy and was at all times relevant to these appeals a consulting psychiatrist to it. He also served in that capacity for Camp Keywaatan and Horizon's.

A number of documents were entered in evidence on behalf of the appellants of which McGovern was the author and relate to children of the appellants in respect of whom deductions in computing taxable income are sought. With respect to Frederick Dean Herriot, the dependant of the appellant Kushnir, they consist of:*

(i) A letter dated December 12, 1980, from McGovern to Kushnir which reads:

> Please let this letter act as evidence that I have prescribed placement in a private residential school for your son Fred, for the September to December, 1980 school term.
>
> On the basis of psychological data and our assessment of Fred, I regard him as psychologically immature and academically underachieving. I prescribed Robert Land Academy as a school specifically designed to deal with his difficulties. I would be willing to provide specific data to substantiate the diagnosis, should the income tax department request it.

(ii) A letter dated March 13, 1981, from McGovern to Kushnir. It relates to a "lengthy final reassessment session (with Fred) at Robert Land Academy on March 5, 1981."

(iii) A four-page letter from McGovern to Kushnir dated December 2, 1981. This arose out of a request dated November 13, 1981, received by McGovern from Revenue Canada requesting substantiation of Kushnir's entitlement to deduct payments made by her to the Academy.

(iv) A letter dated April 12, 1983, from McGovern to Kushnir regarding "a lengthy interview (with Fred) on April 7, 1983."

(v) An undated letter from McGovern addressed to Kushnir which reads:

*An additional letter dated April 1, 1982, from McGovern to Kushnir was entered as an exhibit, but whatever relevance it may have pertains to Kushnir's 1981 taxation year.

1986 CanLII 7388 (TCC)

> The undersigned, being a duly qualified person, hereby certifies that *Frederick Herriot* was, in respect of the taxation years, *1980-81* a person, who by reason of a mental handicap, namely, *Conduct Disorder undersocialized, nonaggressive Personality Disorder* had need of the facilities, personnel and equipment specially provided by the Robert Land Academy for the care and training of persons suffering from such handicap.

McGovern said he had signed this last document very recently. Counsel for the appellants suggested that it be taken as dated November 18, 1985, which was the first day of the hearing of these appeals. No objection was raised in this regard. In what follows it will be referred to as the certificate of November 18, 1985. Nothing turns on whether it was actually signed on November 18, 1985, or one or two days previously. The emphasized words are in the handwriting of McGovern. The rest of the certificate was prepared by counsel for the appellants. It was signed in the presence of appellants' counsel. The pattern regarding the other appellants is basically the same. Included in what the appellant MacLean received from McGovern was a letter dated February 24, 1981, which is nearly the same as the letter dated December 12, 1980, received by Kushnir. It reads:

> Please let this letter act as evidence that I have prescribed placement in a private residential school for your son David.
>
> On the basis of psychological data and our assessment of David, I regard him as psychologically immature and academically underachieving. I prescribed Robert Land Academy as a school specifically designed to deal with his psychological and psychoeducational difficulties.
>
> I would be willing to provide specific data to substantiate the diagnosis, should the income tax department request it.

The appellant Hartman received a letter from McGovern dated April 1, 1982, which reads:

> Please let this letter act as evidence that I have prescribed placement in a private residential school for your son Paul.
>
> On the basis of physical, psychological and social data and our systematic assessment of Paul, we have prescribed placement in Robert Land Academy.
>
> With appropriate authorization, I would be willing to provide specific data to substantiate the diagnosis, should the income tax department request it.

The appellant Bauer received an undated letter from McGovern. It reads:

> Please let this letter act as evidence that I have prescribed placement in Robert Land Academy in Wellandport, for your son, Jerry.
>
> Since his registration there in September of 1979, he has made remarkable strides physically, psychologically, socially and academically. He has obtained a 70% average in Grade 9 despite poor academic progress immediately prior to his placement in this residential school setting. He has expressed pleasure about his physical, psychological, social and academic performance and is optimistic about his future.
>
> I'm grateful for a chance to have helped here.

McGovern speculated that this letter was sent in 1981. Also addressed to the appellants, MacLean, Hartman and Bauer are certificates similar in form to that of the certificate of November 18, 1985, addressed to Kushnir. They were prepared and signed under the same circumstances. They are also undated, but it was agreed that the date of November 18, 1985, would likewise be assigned to them. The psychiatric terminology in each of these four certificates varies. In preparing them McGovern had recourse to the 11th printing, which was in March 1984, of *DSM-III Diagnostic and Statistical*

1986 CanLII 7388 (TCC)

Manual of Mental Disorders, 3rd (1980) edition prepared under the auspices of the American Psychiatric Association.

The certificates of November 18, 1985, were produced because of concern on the part of counsel for the appellants that prior documentation prepared by McGovern might not be regarded as establishing that the dependants of the appellants had been "certified" within the meaning of subparagraph 110(1)(c)(vi) of the Act. I fully appreciate counsel's apprehension in this regard. In the last analysis the appellants relied on the certificates of November 18, 1985, and to what was described in relation thereto by their counsel as the "earlier certificates". These earlier certificates were precisely identified by him as correspondence previously referred to, namely: letter from McGovern to Kushnir dated December 12, 1980; letter from McGovern to Hartman dated April 1, 1982, and the undated letter from McGovern to Bauer which the former thought was sent some time in 1981.

I will deal first with the certificates of November 18, 1985. The combined effect of section 169, subsection 171(1) and the definition of "assessment" in subsection 248(1) of the Act is to give the appellants a right to appeal to this Court to have the reassessments made* on the mailing dates previously mentioned vacated, varied or referred back to the respondent for reconsideration and reassessment. Those reassessments were made on the basis that the dependants had not been certified as required under subparagraph 110(1)(c)(vi). I cannot appreciate how they can be successfully attacked by resorting to certificates which were not in being until years after the reassessments were made. The reassessments could be in error only if, at the time they were made, there was lawful authority for the deductions claimed and indispensable to such authority was the existence of certification under the legislation.

Furthermore, it strikes me that if what is described in *Maxwell on Interpretation of Statutes*, 12th (1969) edition at page 28 as the first and second most elementary rules of construction are applied to subparagraph 110(1)(c)(vi) and the relevant words therein are given their ordinary meaning and they are construed according to the rules of grammar, this leads to the conclusion that in order for the deductions to be allowable, the dependants must have been certified at the time the amounts were paid on their behalf. I focus in particular on these words in the Act: "For the purpose of computing the taxable income of a taxpayer there may be deducted an amount paid by the taxpayer if payment was made for the care, or the care and training, of any dependant, who has been certified by an appropriately qualified person." In accordance with the general rule, the onus would be on the appellants to establish this. It is, however, unnecessary for me to apply this interpretation of the legislation in determining these appeals for the reasons that follow.

For explanations already given, the only certificates that can have any relevance to these appeals are the earlier certificates. I shall deal with each of them. The McGovern letter of December 12, 1980, to Kushnir is the early certificate regarding the latter's appeal. It will be noted that this document was specifically prepared by McGovern with the intention that it should be acted upon by the taxing authorities. It states that he prescribed that the appellant's dependant be placed in a private residential school and that he

*Subsection 244(15) of the Act provides: "Where any notice of an assessment has been sent by the Minister as required by this Act, the assessment shall be deemed to have been made on the day of mailing of the notice of assessment."

1986 CanLII 7388 (TCC)

prescribed Robert Land Academy in this regard. Of the four appellants only two, Kushnir and MacLean, testified. Kushnir was referred to McGovern with respect to problems she was having with her son Fred. She said that McGovern never spoke to her about placing Fred in the Robert Land Academy. All he made reference to was "a residential school."* The witness knew about Ridley College and Upper Canada College and obtained brochures regarding these schools. She did the sme regarding Appleby College and private schools near Trenton and Newmarket. It was with the assistance of the principal of the school where she worked that she discovered Robert Land.

The appellant MacLean told of the difficulties she was having with her son David who is the dependant in respect of her appeal. She went on to say that on her own she canvassed the school system including private schools seeking assistance for him. Specific mention was made of Ridley College. In the course of this search she discovered Robert Land. She contacted Bowman by telephone and arranged to meet with him. David was present at the meeting and he was submitted to some unidentified written test, the results of which were disappointing. Nevertheless: "Mr. Bowman said he would take David anyway because he felt that he could help him, and so David went to Robert Land." No mention is made of McGovern in MacLean's testimony. McGovern saw David after he was admitted to the academy. This was at Bowman's request and he was present at the interview. The evidence does not indicate when this occurred, but there is a document filed as an exhibit dated April 27, 1981, which mentions a final assessment session on April 2, 1981. As already noted, the prior certificate in this appeal is, in substance, the same as the prior certificate in the Kushnir appeal. As the appellants Hartman and Bauer chose not to testify, I believe I am warranted in assuming that the enrolment of their dependants in Robert Land is not attributable to advice on the part of McGovern. The evidence of Kushnir and MacLean and this assumption is consistent with McGovern's evidence. He said:

> No, counsellor, I never refer a case to Robert Land ACademy. I always indicate that here's the diagnosis, and there are — the present treatment modalities are obviously not working, here are some schools that might indeed accept your son, and I know that Robert Land Academy for which I am the consultant would be a very good school.

I interject this observation at this point. McGovern's reliability as a witness was in large measure devastated in the course of his being cross-examined by Mr. Templeton. This is well underscored by what follows. Early in his lengthy testimony McGovern was shown a report dated October 5, 1985 (a few weeks before the commencement of the hearing) on his letterhead and bearing his signature. It is addressed to counsel for the appellants. He acknowledged it as his "report about Robert Land Academy as an important source of Milieu Therapy". It was entered as an exhibit and McGovern said nothing at that time to suggest that the report should not be taken at face value. Counsel for the respondent raised this document in cross-examination and drew particular attention to certain passages. He also entered in evidence as an exhibit an extract from a work entitled *Basic Handbook of Child Psychiatry* volume 3. The extract is Part D which is entitled *Environmental Therapies*, with the subtitle *Milieu Therapy: The Orthogenic*

*In *Somers* v. *M.N.R.*, [1979] C.T.C. 2001; 79 D.T.C. 21, it was held that Ashbury College in Rockliffe, Ontario, is not a school or institution of the kind described in paragraph 110(1)(c)(vi).

1986 CanLII 7388 (TCC)

School Model. The authors of Part D are Bruno Bettelheim and Jacquelyn Sanders. This appears at page 7 and 8 of the report. All of this was put forward as McGovern's creation:

> *First, a child was much more vulnerable to the impact of his parents, from whom he may have to be* separated, and secondly, *for some centuries society has been convinced that the young, for their own good, must be removed for considerable periods of time into a very special institution supposedly designed to meet their needs: schools. Schools overtly teach,* but *also free adult society from the burden of* interfering *children. For many years it was a canon of education that children suffering from severe physical defects should be placed in institutions which provided classroom teaching and other guidance geared to the nature of their deviation. After World War One,* psychiatrist *August Aichhorn treated a group of wayward youngsters in an institutional setting,* utilizing psychoanalytic theory as the basis for his very successful "Milieu Therapy". *Years later* psychiatrists *Slavson, Redl, and others, applied Aichhorn's principles to group or camp settings, and out of their efforts grew the procedure now known as group therapy. Redl pioneered summer camp settings for delinquent youngsters in which camp activities and group life were designed to have a therapeutic impact, independent from or in addition to the group* therapy and *individual* therapy. *In the United States during the 1940s,* a large number and great variety of treatment settings were offered for *the treatment of very disturbed children within residence.* Psychiatrist *Stanislaus Szurek at Langley Porter Clinic in San Francisco, Fritz Redl,* under whom I worked *in Detroit,* and *those working at Southward schools in Topica and with the Jewish Board of Guardians in New York, are among the most noteworthy. Under the stimulus of the new thinking, residential institutions for disturbed children proliferated widely. All these efforts* convinced psychiatry that *the effect of the environment on the rehabilitation of children,* was of maximum importance. *In 1944 the University of Chicago entrusted Bruno Bettelheim with the task of re-organizing its Orthogenic School, in line with the most advanced ideas of the treatment of severely disturbed children. It* has *become apparent* to every professional involved *that how a child was fed, bathed, toileted, treated on getting up and put to bed,* were more *important* than individual and group psychotherapeutic efforts. *It soon turned out that such events, when handled with understanding and skill,* were *even more important than* the presence of a psychiatrist in the residence at any time. *Since all children with major emotional illness suffer from severe ego disturbance, they need to have* practical *help in mastering all those life experiences that lead to* ego development. Psychiatrists *Bettelheim and Sylvester* scrutinized the success of *their common work,* and coined *the term 'Milieu Therapy'. The Oxford Dictionary defines 'milieu' as a "medium, environment, surrounding,"* and *this was exactly what Bettelheim and Sylvester had in mind; in* their *first* joint *publication, Bettelheim and Sylvester stressed that their's was not a new technique. Their article on "Milieu Therapy" begins: "Milieu therapy is not new as a psychotherapeutic technique. It is no more than the application of psychoanalytic concepts to the specific task of creating a setting for emotionally disturbed children who are in need of residential treatment.*
>
> [Emphasis supplied]

This is said by Bettelheim and Sanders at pages 218 and 219 in Part D:

> *First, a child is much more vulnerable to the impact of his parents — from whom he may have to be* protected, as exemplified by the "battered" child — than is the average adult to the influence of his closest relatives. *Second, for some centuries, society has been convinced that the young, for their own good, must be removed for considerable periods of time into a very special institution, supposedly designed to meet their needs: schools. Overtly, schools* are designed only to *teach* what children need to learn; covertly, schools *also* serve to *free adult society* for a time *of the burden of* its *children* so that they do not interfere unduly with its operations. Since all children attend some institution especially planned for them, the idea that special children, such as the severely disturbed, need institutions especially designed for their needs is easier to accept.

1986 CanLII 7388 (TCC)

For many years, it was a canon of education that children suffering from severe physical defects should be placed in institutions which provided classroom teaching and other guidance geared to the nature of their deviation. For example, it was accepted that blind children required from the institution not only methods of teaching different from normal children, but special arrangement of all other life activities. This was true long before the need for the special institutions for mentally disturbed children was recognized.

After World War I, in an all too short-lived experiment, *August Aichhorn treated a group of wayward youngsters in an institutional setting.* While this in itself was not new, Aichhorn's experiment was critical in the history of the development of milieu therapy for children. Here, for the first time, was a deliberate effort to apply psychoanalytic understanding to the "life" structure of his own transference relationship to guide the lives of some of his patients. In the institution, he, the doctor, became involved in the life of the group, supporting and guiding the "child care" staff to make use of the living situation to rehabilitate the youngsters. For instance, a group of boys was permitted to act out and destroy things in accordance with the notion that this would have a cathartic effect. Then, rather than being punished, they were given new quarters. Thus, psychoanalytic theory was applied not only in the traditional analytic sessions, but to a whole life situation.* *Years later, Slavson, Redl, and others applied Aichhorn's principles to group or camp settings, and out of their efforts grew the procedure now known as group therapy* (see chapter 10). *Redl pioneered summer camp settings for delinquent youngsters in which the camp activities and the group life were designed to have a therapeutic impact independent from, or in addition to, individual and group* treatment.

Among psychoanalytically trained therapists, it became accepted that as much attention must be paid to all details of the setting in group psychotherapy as was necessary in individual therapy. But within institutions, except for Aichhorn's work, the prevalent conviction persisted that the setting need only be humane and protective, while the true therapeutic impact would come from individual or group therapy sessions, or from a combination of both.

In the United States during the 1940s, a number of psychoanalytically trained people began to apply psychoanalytic principles to *the treatment of very disturbed children within a residence. Stanislaus Szurek at Langley Porter Clinic in San Francisco, Fritz Redl in Detroit, those working at Southard School in Topeka, and the staffs at settings associated with the Jewish Board of Guardiens in New York are among the most noteworthy. Under the stimulus of the new thinking, residential institutions for disturbed children proliferated widely* at that time. *All these efforts* contained some element of concern for *the effects of the environment on the rehabilitation of the children.* It was during this same period that Maxwell Jones began working on the development of a therapeutic community for adults in England.

In 1944, the University of Chicago entrusted Bruno Bettelheim with the task of reorganizing its Orthogenic School in line with the most advanced ideas on the treatment of severely disturbed children. He was able to secure Emmy Sylvester's help in that work. Bettelheim and Sylvester undertook to formulate a more comprehensive approach: What would the setting and life within an institution for children suffering from severe functional disorders be like, if every detail was in line with psychoanalytic thinking on child development and child psychotherapy? *It* immediately *became apparent that how a child was fed, bathed, toiletted, treated on getting up and being put to bed* were just as *important* as what occurred during his daily psychotherapy. In fact, *it soon turned out that such events, when handled with understanding and skill, were even more important than* what could be achieved for the child in his individual treatment hour. *Since all children with major emotional illnesses suffer from severe ego disturbance, they need to have help in mastering all those life experiences that lead to ego* growth.

*After the words in this passage which are not emphasized were read to McGovern, he agreed that: "Certainly Robert Land is the very opposite of this approach."

1986 CanLII 7388 (TCC)

This was the situation which led not only to much of the thinking that went into the creation of milieu therapy, but also prompted the selection of its name. When *Bettelheim and Sylvester* felt ready to report on *their common work*, they were hard-pressed to find a suitable name for it. *The term "mileau therapy"* finally occurred to one of them, and a consultation of *the Oxford Dictionary* indicated its appropriateness. *"Milieu" was defined as "a medium, environment, surrounding." This was exactly what Bettelheim and Sylvester had in mind*, for what they had tried to create was a medium — an enveloping matrix within which one lives; an agency; an environment. Within the framework of psychoanalytic thinking, they strove to create an environment, both physical and human that would in itself function as an agency for therapy. "A Therapeutic Milieu" was the title for their first publication describing the work of the Orthogenic School, shortly followed by another, "Milieu Therapy — Indications and Illustrations."

In these first publications, Bettelheim and Sylvester stressed that theirs was not a new technique. Their article "Milieu Therapy" begins:

> *Milieu Therapy is not new as a psychotherapeutic technique. It is no more than the application of psychoanalytic concepts to the specific task of creating a setting for emotionally disturbed children who are in need of residential treatment . . . .*

[Emphasis supplied.]

This is also said at pages 8 and 9 of McGovern report:

> Psychiatrists *Caudill, Goffman and Henry*, after successfully utilizing their Milieu Therapy approaches for psychotic and delinquent children and adolescents, concluded, "The *one most important, single factor in treating the psychotic child* or delinquent child is this; despite the complexities, vagaries and crises of his life, the child or adolescent *should be surrounded at all times by the reality of a unified setting.* And this setting cannot be artificial regarding the importance of relating to the realities of adult authority and peers, and the responsibilities of day-to-day existence. A clement philosophy regarding treatment is as imperative as particular scientific tactics. Since solidarity is based on commitment to what the institution stands for, it must stipulate defense against those who seem, rightly or wrongly, to act out of line with its ethos."

[Emphasis supplied]

The language of the sentences in quotation marks is not that of the psychiatrists named or any one or more of them. Bettelheim and Sanders said this at page 221 of Part D:

> It was agreed that there was *one most important single factor in treating the psychotic child.* It was *this:* that *despite the complexities, vagaries, and crises of his life, the child should be surrounded at all times by the reality of a unified setting.* This view has been supported by the findings of *Caudill, Goffman*, and others who brought this concept to wider attention, *and Henry* who, for a few years, joined in the work of the Orthogenic School and published his findings.
>
> [Emphasis supplied]

At page 9 of his report McGovern adds:

> *Recognizing these opinions and facts* concerning Milieu Therapy, more recently psychiatrist Sachehay (sic)* concluded, *"The therapeutic milieu must take very seriously the problem of how to convey meaning, not only through rational arrangements but also through the attitudes reflected by the physical setting. This is the carrier of symbolic meaning. How the institution is built and furnished, down to the last detail of lighting and furniture, must all be designed to convince the patient that this is a place* that expects order and harmony and appropriate impulse controls and introversion in some settings, while in others that are part of the same Milieu Therapy setting, one can become more extroverted and group oriented and active, safely and securely . . .".
>
> [Emphasis supplied]

*Exhibit R-3 indicates that the correct spelling is Sechehaye.

1986 CanLII 7388 (TCC)

The quoted words are not those of Sechehaye. Bettelheim and Sanders said this at page 225 of Part D:

> *Recognizing these facts, the therapeutic milieu must take very seriously the problem of how to convey meaning not only through rational arrangements but also through the attitudes reflected by the physical setting. This is the carrier of symbolic meaning. How the institution is built and furnished, down to the last detail of lighting and furniture, must all be designed to convince the patient that this is a place* where he can afford to let down his defenses, because everything is here to satisfy all his needs. Further, he must become convinced that these satisfactions will not endanger him, and that he will not be destroyed, even if he relaxes his controls over his anger and anxiety. But he will believe this only if even inanimate objects tell him that everything is here for him, that he is terribly important to the staff, and that life can be good even for him. Only then can be dare to begin to trust the institution's intentions and begin to get well.
>
> [Emphasis supplied]

The justification offered by McGovern for this conduct, which was undisclosed except under cross-examination, is that he prepared the report in haste and under pressure. I cannot accept it.

Reverting to the earlier certificates in the Kushnir and MacLean appeals, each contains this same "diagnosis" by McGovern: "I regard him (the dependant) as psychologically immature and academically underachieving." At no time did McGovern suggest that these words are identifying the existence of mental handicap. He said that it was his practise in dealing with parents of children he examined to mask the true nature of the problem identified because of what he considered potential harm. This *modus operandi* is obvious from the fact that while the diagnosis in each of the earlier certificates in the Kushnir and MacLean appeals are the same, the diagnosis in the certificates of November 18, 1985, are not ony different from what was diagnosed earlier, but also from each other.

Another person called on behalf of the appellant MacLean as an expert witness is Dr. Charles Cunningham, a clinical psychologist. He had examined David MacLean, but said that he was unfamiliar with Robert Land. In the circumstances there could be no question of his having certified David within the meaning of the legislation. Cunningham was, however, asked this question and gave this reply which is relevant to McGovern's method of dealing with parents:

> Q. So I think in the statement you are indicating that it is very important that exactly what the child's difficulty is then be communicated to the people who are involved. It would be the parents — it would be very important that the parents understand what the difficulty is?
>
> A. Yes.

It strikes me that this answer is eminently sensible. Surely in the absence of some special circumstance, when parents retain professionals to advise them about their children's mental or physical health, steps should be taken to inform them with whatever exactness is reasonably possible of the child's true condition in order that parents may make informed decisions regarding the course of action to pursue.

The language most akin to the words "academically underachieving" which appear in the prior certificates in the Kushnir and MacLean appeals that was discussed at the hearing is the phrase "learning disability". In that regard McGovern ventured this opinion:

> The average child that is labelled a learning disability is unquestionably, I suppose, a child like Winston Churchill who is sanguine in temperament, a dominant

1986 CanLII 7388 (TCC)

> aggressive, disorganized person basically, and is very much at risk for not responding, not developing a conscience. In Winston Churchill's case, I'm pointing something like this forward, of course, he had the best teaching, the best environmental influences; he was the first to admit that without these he may have been a misfit; he had anti-authoritarian attitudes.

With respect to the Bauer appeal the transcript shows McGovern giving these answers:

> Q. All right, thank you. And so than Jerry (Bauer) went to see Mrs. Elgie, and it was basically on the basis of Mrs. Elgie's report that it was decided whether or not Robert (sic) would come into Robert Land Academy or not, along with the other criteria that —
>
> A. I believe so. I believe so.
>
> Q. — that Mr. Bowman would normally use.
>
> A. Yes, I believe so.

Nancy Ann Elgie is a psychologist and testified as an expert witness on behalf of the appellant Bauer. Through her a report was filed as an exhibit which is dated May 15, 1979. She prepared it in relation to an examination of Jerry Bauer conducted by her on April 18, 1979. This report was discussed at length and at the conclusion of her cross-examination this exchange took place:

> His Honour: If somebody asked you the question, is your assessment of Jerry Bauer or was your assessent of Jerry Bauer on April 18th, 1979, that he was a mentally handicapped boy, would you have said yes?
>
> Witness: No, I would not have said yes.

The prior certificate in the Hartman appeal is not descriptive of the dependant's mental condition and the prior certificate in the Bauer appeal contains nothing that can be construed as saying that the dependant was a mentally handicapped person. These certificates also state that McGovern "prescribed placement" of the dependants in Robert Land. This has already been dealt with.

When regarded in its totality the evidence leads me to the conclusion that McGovern never certified any of the dependants within the contemplation of subparagraph 110(1)(c)(vi) of the Act. It follows that these appeals cannot succeed.

The appeals are dismissed.

Appeals dismissed.

1986 CanLII 7388 (TCC)